IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK WALKER,	:	CIVIL ACTION
	:	
v.	:	
	:	
THOMAS J. SPILLER and CITY OF PHILADELPHIA	:	NO. 97-6720

MEMORANDUM AND ORDER

Anita B. Brody, J. **June _____, 1998**

Plaintiff Derrick Walker ("Walker") sued defendants Police Detective Thomas J. Spiller ("Spiller") and the City of Philadelphia for violation of his civil rights and for tortious injury, claiming that Spiller violated his Fourth Amendment right to be free from unreasonable search and seizure when Spiller arrested him without probable cause, and with malicious, racist intent. On September 3, 1996, I granted summary judgment in defendants' favor on all of Walker's claims.[1] I am issuing this memorandum and order in response to Walker's motion for reconsideration.

Walker asks me to reconsider my grant of summary judgment because: (a) defendants' motion for summary judgment relied upon

[1] While this order was signed on September 3, 1996, it was not officially filed and entered on the docket by the Clerk's Office until September 12, 1996

unverified and unauthenticated evidence; (b) defendants' motion for summary judgment relied upon hearsay evidence; and (c) even were defendants' evidence admissible, it fails to establish that defendant Spiller had probable cause to arrest plaintiff Walker. For the reasons discussed below, I will grant Walker's motion for reconsideration and vacate my summary judgment order as to defendant Spiller.[2] On reconsideration, I will deny defendants' motion for summary judgment as to defendant Spiller, because there are genuine issues of material fact. I will, however, deny Walker's motion for reconsideration as to defendant City of Philadelphia, as Walker has put forward no new arguments as to this defendant in his motion for reconsideration.

I. Motion for Reconsideration

Walker brings his motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1. The defendants, in response to Walker's motion

[2] Walker initiated this suit pro se. I denied his first request for appointment of counsel in April 1996 and his second request for counsel in June 1996. On December 17, 1996, following the entry of summary judgment for the defendants and plaintiff's filing of a motion for reconsideration, I granted plaintiff's third motion for appointment of counsel. On August 19, 1997, counsel was appointed. Walker's counsel has filed a revised motion for reconsideration; the arguments Walker puts forth about the nature of defendants' evidence were not previously raised, when Walker was proceeding pro se.

for reconsideration, argue, first, that plaintiff's motion for reconsideration is untimely, and, second, that grounds for reconsideration do not exist here. I will address these arguments in turn.

A. Timeliness

Both the local and federal rules require that a motion for reconsideration "be served" not later than or within ten days after judgment has been entered. The defendants maintain that Walker's motion is not timely because it was not served within ten days of the entry of judgment.

Although I signed the order granting defendants' motion for summary judgment on September 3, 1996, judgment was not officially entered until September 12, 1996, the date when my order was entered on the docket. See Neely v. Merchants Trust Co. of Red Bank, 110 F.2d 525 (3d Cir. 1940) (entry of judgment occurs when clerk enters the judgment on the civil docket and not at the time when the judgment is signed by a judge). Walker served his first motion for reconsideration on September 26, 1996. Excluding weekends, as directed by Fed. R. Civ. P. 6(a), plaintiff's September 26 motion challenging the September 12 judgment was timely filed.[3] Furthermore, plaintiff's time to

[3]Walker filed a pro se motion to alter or amend the judgment pursuant to Fed. R. Civ. Pro. 59(e) and a separate motion for relief from judgment pursuant to Fed. R.Civ. Pro. 60(b) on

respond did not begin running until September 15, pursuant to Fed. R. Civ. P. 6(e), because the judgment was served upon him by mail. Thus, Walker's initial motion for reconsideration was filed in a timely manner. I will turn now to the substance of Walker's motion.

B. Standard of Review

A motion for reconsideration exists to "correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see also Kauffman v. Aetna Casualty and Surety Co., 1992 WL 245863 (E.D. Pa. 1992), United Union of Roofers, Waterproofers and Allied Workers Local Union No. 30 v. Gundle Lining Construction Corp., 1992 WL 34127 (E.D. Pa. 1992). Generally, a motion for reconsideration will only be granted if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice. Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994). A party may not submit evidence which was available to it prior to the court's grant of summary judgment.

September 26, 1996. On December 17, 1996, I granted Walker's motion for appointment of counsel, and, on August 19, 1997, counsel was appointed. Walker's counsel has now submitted a revised motion for reconsideration; this revised motion is what I consider here.

Id. at 97. Nor is a motion for reconsideration properly grounded on a request that a court rethink a decision it has already made. Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

Walker's motion for reconsideration does not suggest that there has been a change in the controlling law or that there is any newly discovered evidence. The only ground, therefore, upon which he may succeed is that I must correct a clear error of law or other manifest injustice resulting from my earlier order on defendants' motion for summary judgment. Walker asserts that manifest injustice results from my granting summary judgment based on inadmissible and insufficient evidence presented by the defendants. Plaintiff’s motion for reconsideration presents an important argument, not highlighted in his pro se pleadings, as to the defendants’ misrepresentation of the evidence of probable cause at summary judgment. See Starr v. JCI Data Processing, Inc., 767 F. Supp. 633, 635 (D.N.J. 1991). Given that pleadings filed by a litigant proceeding pro se must be evaluated using less stringent standards, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and to prevent manifest injustice to the plaintiff, I will reconsider the defendants’ motion for summary judgment.

II. Factual Background

The following facts are either not in dispute, or are presented in the light most favorable to plaintiff, the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Walker is an African-American male. Spiller is an officer of the Police Department of the City of Philadelphia. On April 25, 1994, Spiller went to Holmesburg Prison in order to arrest and charge Walker with the robbery of Bill Winkler, which occurred on December 24, 1993. (Amended Compl., ¶ 16). Spiller did not obtain an arrest warrant for Walker, even though there were no exigencies requiring immediate arrest. Walker presented no threat of fleeing, given that he was incarcerated.

When Spiller told him the date of Winkler's robbery, Walker told Spiller repeatedly that he could not have committed the robbery because he was incarcerated at SCI-Greensburg on December 24, 1993. (Amended Compl., ¶ 14) Spiller refused to consider or check out Walker's alibi. Walker contends that such a check could have been done very rapidly, via a phone call or computer check.

At the time of arrest, Spiller threatened and harassed Walker, using degrading and derogatory racial slurs, and stating that he would "clean the books up with" Walker if he did not confess to Winkler's robbery. (Amended Compl., ¶ 13) Walker

contends that this statement meant that Spiller would close unsolved cases by framing Walker and charging him with those crimes. Walker maintained his innocence and his water-tight alibi. Spiller arrested and charged Walker with the robbery of Winkler.

On June 16, 1994, a line-up was held at the Philadelphia Detention Center to determine whether Winkler could identify Walker. (Amended Compl., ¶ 20) Winkler could not, and shortly thereafter the charges against Walker were dismissed. Defendants have produced no evidence showing that they ever checked Walker's claim that he was imprisoned on the date of Winkler's robbery.

Spiller and Walker had met before the Winkler arrest incident, on March 22, 1994, when Spiller arrested Walker for a different robbery. On that occasion, Spiller tried to coerce Walker into confessing, and, again, told Walker that he would use him to clean up his books. (Walker Decl., ¶ 12). At that time Spiller also made demeaning and racist remarks, and physically abused Walker. (Id.)

III. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. When the moving party does not bear the burden of persuasion at trial, as is the case here, its burden "may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "may not rest upon the mere allegations or denials of the [nonmoving] party's pleading," id., but must support its response with affidavits, depositions,

answers to interrogatories, or admissions on file.[4] See Celotex, 477 U.S. at 324; Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).

To determine whether summary judgment is appropriate, I must determine whether any genuine issue of material fact exists. An issue is "material" only if the dispute "might affect the outcome of the suit under the governing law." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. Of course, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson, 477 U.S. at 255; see also Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255; see also Big Apple BMW, 974 F.2d at 1363. Thus, my inquiry at the summary judgment stage is only the "threshold inquiry of determining whether there is the need for a trial," that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or

[4]In pro se cases, I ordinarily construe a plaintiff's pleadings as affidavits for purposes of summary judgment motions. See Reese v. Sparks, 760 F.2d 64, 67 n. 3 (3d Cir. 1985) (treating verified complaint of a prisoner acting pro se as an affidavit).

whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250-52.

IV. Probable Cause

Walker claims, pursuant to 42 U.S.C. §1983, that Spiller, while acting under color of state law, violated his Fourth Amendment right to be free from unreasonable search and seizure when Detective Spiller arrested Walker for the robbery of Bill Winkler without probable cause. The Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause. Probable cause to arrest exists "when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." Orsatti v. New Jersey State Police, 71 F.3d 480, 483 (3d Cir. 1995). A determination of probable cause is made based on "the facts available to" the arresting officer. Bech v. Ohio, 379 U.S. 89, 96 (1964).

In order to prevail on his federal civil rights claim, Walker must establish that Spiller initiated criminal proceedings against him, without probable cause, with malice or for an improper purpose, and that the proceedings were terminated in

Walker's favor. Lippay v. Christos, 996 F.2d 1490, 1503 (3d Cir. 1993). Defendants admit that Spiller, acting under color of state law, initiated criminal proceedings against Walker and that the charges were dismissed. Defendants deny any ill motive on Spiller's part and argue that probable cause for Walker's arrest did exist.

I found at summary judgment that Spiller had probable cause to arrest Walker for the robbery of Winkler because the defendants' evidence showed that:

(1) an informant, Reginald Curry, implicated Walker in the robbery;

(2) the robbery of Winkler fit a pattern of robberies in which Walker had been implicated; and

(3) Winkler positively identified Walker as one of the men who robbed him when shown a photo display that included Walker and Curry.[5]

Plaintiff raises questions as to both the admissibility and the sufficiency of the defendants' evidence for these facts establishing probable cause. Although the admissibility issues, regarding authentication and hearsay, are troubling in their own right, because the crux of this case is the sufficiency of the defendants' evidence, I will focus on plaintiff's argument that the defendants, at summary judgment, misrepresented their

[5]Summary Judgment Order, at 4.

evidence of probable cause.[6]

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[6]Plaintiff Walker questions the admissibility of defendants' exhibits C (titled "Complaint or Incident Report"), D (referring to reports of robberies committed on March 22, 1994), E (identified by defendants as the confession of Reginald Curry), and G (titled "Investigation Report"). Walker asserts that these exhibits would be inadmissible at trial, and, therefore, should not be considered at summary judgment, for two reasons: they are unauthenticated and they are hearsay.

Rule 56 requires the party moving for summary judgment to base its motion upon admissions and sworn testimony. The court may not consider unverified or unauthenticated documents submitted by the moving party in deciding a motion for summary judgment. See Clark v. Clabaugh, 20 F.3d 1290, 1294 (3d Cir. 1994); Palomba v. Barish, 626 F. Supp. 722, 725 n.11 (E.D. Pa. 1985). Walker correctly points out that defendants' Exhibits C, D, E, and G, the exhibits relied upon by defendants to establish probable cause, are all unverified and unauthenticated. Defendants do not contest that these documents are unverified and unauthenticated (Def. Resp. in Opp. to P's Revised Motion for Reconsideration, at 5). Thus, I should not have considered these exhibits at the summary judgment stage.

However, I assume the defendants' failure to authenticate their evidence could be easily corrected. Walker raises a more troubling point: defendants, at summary judgment, relied upon the contents of these four exhibits to establish material facts, and in each case the contents relied upon are hearsay statements, which cannot be considered at summary judgment if they would not be admissible at trial. See Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267, 1275 n. 17 (3d Cir. 1995).

Each of these exhibits contains statements of others recorded by defendant Spiller or another police officer. Exhibit C is an Incident Report made by a Police Officer on December 24,1993; this report contains a cursory summary of what Bill Winkler reported, namely that he had been robbed at gunpoint by two black males while walking up the steps to his house. Exhibit D contains Detective Savidge's summary of his investigation into the robbery of Michael Rimm, including descriptions of what various witnesses to the robbery reported. Exhibit E contains Detective Spiller's recording of an interview with Reginald Curry on March 22,1994 (relied upon by defendants in their Motion for Summary Judgment, at 5). Exhibit G is an "Investigation Report" compiled by Detective Spiller on June 16, 1994, which relates the statements of Bill Winkler and Brian Peters (relied upon by defendants in their Motion for Summary Judgment, at 5). Each of these exhibits records third-party statements or matters observed

A. Sufficiency

Plaintiff Walker contends that, even assuming the defendants' exhibits are competent evidence, they fail to establish that Spiller had probable cause to arrest Walker for the robbery of Bill Winkler. Thus, plaintiff alleges, genuine

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by police officers in a criminal case, and thus, is hearsay. The third-party statements contained within these exhibits will not be admissible if presented for the truth of the matter, unless they fit within one of the hearsay exceptions.

Although a police report is admissible under some circumstances under Fed. R. Evid. 803(8)'s exception, any contents of the report that record the statements or observations of someone other than the police officer are double hearsay and inadmissible. See U.S. v. Sallins, 993 F.2d 344, 347 (3d Cir. 1993). Furthermore, Rule 803(8)(B) expressly excludes from the public records' hearsay exception "matters observed by police officers and other law enforcement personnel" in criminal cases.

Defendants argue that the statements in the documents are not hearsay, because they are not presented for the truth, but as evidence of what knowledge Spiller had when he decided to arrest Walker. This argument would have merit, if I had before me a sworn statement by Detective Spiller that he relied upon these investigatory reports in determining that there was no probable cause. However, here, defendants submitted the exhibits as direct evidence of what information Spiller was given before he arrested Walker; therefore, the reports are offered for the truth of the assertions that (1) Curry told Spiller that Walker was his acomplice (Exhibit E; Memo of Law in Supp. of Def. Mot. for Summary Judgment at 6, 9; Def. Reply Memo. in Supp. of Def. Mot. for Summary Judgment at 2); (2) Officers Peters and Hewitt told Spiller that they had identified a string of related robberies and some suspects (Exhibit G; Def. Mot. for Summary Judgment at ¶ 7; Memo of Law in Supp. of Def. Mot. for Summary Judgment at 2); and (3) Winkler told Spiller that Walker was one of his assailants after viewing a photo display (Exhibit G; Def. Mot. for Summary Judgment at ¶¶ 8-9; Def. Reply Memo. in Supp. of Def. Mot. for Summary Judgment at 2). The reports are offered for the truth of Spiller's allegation that he was given certain information. Thus, they are hearsay and inadmissible. Without these exhibits, I would not have found probable cause to have existed at the time that Spiller arrested Walker.

issues of material fact remain, and the issue of probable cause must be adjudicated at trial. I will go through each of the pieces of evidence for probable cause presented by the defendants in their motion for summary judgment.

First, the defendants argued at summary judgment that Reginald Curry, in his confession, implicated Walker in the robbery of Bill Winkler (Memo of Law in Supp. of Def. Mot. for Summary Judgment at 6, 9; Def. Reply Memo. in Supp. of Def. Mot. for Summary Judgment at 2). The plaintiff, in his motion for reconsideration, points out that this "implication" is nonexistent. The confession of Reginald Curry states that Curry committed five robberies with "Demetrius" in March 1994 (Exh. E); however, Winkler was robbed on December 24, 1993. Thus, even assuming Walker is "Demetrius," and thus implicated in a string of robberies with Curry, Curry did not implicate Walker in the robbery of Bill Winkler, the only robbery with which I am concerned here. The defendants appear to have inferred too much from Curry's confession.

Second, the defendants asserted at summary judgment that Detective Peters had identified suspects, namely Reginald Curry and Walker, in a string of robberies, which formed a pattern, and that the robbery of Bill Winkler fit within this pattern (Def. Mot. for Summary Judgment at ¶ 7; Memo of Law in Supp. of Def. Mot. for Summary Judgment at 2). As plaintiff points out in his

motion for reconsideration, this assertion is not clearly substantiated by the evidence submitted by the defendants. Detective Peters' affidavit makes no mention of any suspects, and although it refers to a common pattern it does not identify the elements of that pattern (Exh. F). Detective Spiller's investigation report states that Detectives Peters and Hewitt had identified two suspects, but does not state that Walker was one of them (Exh. G). Rather, Spiller's investigation report states that based on Peters' and Hewitt's information, Spiller showed Winkler a photo of Walker. Thus, it is unclear whether Walker had been linked to this "pattern" of robberies by Officers Peters and Hewitt, or whether Spiller made this connection himself, on the basis of information not before the court.

Finally, the defendants relied heavily at summary judgment on the assertion that Bill Winkler identified Walker as his assailant (Def. Mot. for Summary Judgment at ¶¶ 8-9; Def. Reply Memo. in Supp. of Def. Mot. for Summary Judgment at 2). The investigation report prepared by Spiller on June 16, 1994 (after Walker's arrest) does state that on April 6, 1994, Spiller showed Winkler "two photo displays," and Winkler positively identified Walker as one of the men who robbed him (Exh. G). However, this evidence is problematic, because there is no information as to the type of photo display used or how Spiller presented the photos to Winkler. See Clipper v. Takoma Park, 876 F.2d 17 (4th

Cir. 1989) (where an officer investigating a bank robbery took a photograph of plaintiff, and no other photographs, to the bank for identification, and Clipper was arrested on the basis of witnesses' identification, a jury verdict for plaintiff on false arrest was sustained by the court). Therefore, I am unable to determine the reliability of Winkler's identification based on exhibit G.

Apart from these exhibits, the defendants produced no evidence that (1) Reginald Curry implicated plaintiff Walker in any robbery; (2) Walker fit any description given by Winkler, or (3) Winkler positively identified Walker as one of his assailants. The plaintiff points out that the defendants have at no point submitted an affidavit from Spiller as to whether or why he believed that he had probable cause to arrest Walker for the robbery of Winkler. Genuine issues of material fact remain as to whether Detective Spiller had probable cause to arrest Walker on April 25, 1994.

B. Failure to Investigate

Plaintiff additionally attempts to reraise the issue of whether any probable cause to arrest that may have existed was negated when he told Detective Spiller that he was incarcerated on the day of Winkler's robbery. Walker has submitted sworn statements that he immediately informed Spiller that he had been

incarcerated at the time of the Winkler robbery. Spiller refused to investigate this alibi. I decided at summary judgment that Spiller's failure to investigate whether Walker was, in fact, incarcerated on the day of Winkler's robbery did not trigger a violation of the Fourth Amendment rising to constitutional dimensions. However, this failure to investigate must be weighed in the context of the strength or weakness of the probable cause evidence. If Spiller had a strong basis for probable cause when he went to Holmesburg prison to arrest Walker, then his failure to investigate any exculpatory evidence would not rise to constitutional dimensions. Given the weakness of the evidence of probable cause here, Spiller had a duty to investigate Walker's alibi, especially as there was no danger of Walker fleeing. See Romero v. Fay, 45 F.3d 1472 (10th Cir. 1995) (holding officer's failure to investigate plaintiff's alleged alibi for homicide, because he thought they would lie to protect the plaintiff, reasonable; however, the court appeared to distinguish "alleged alibi witnesses" from "basic evidence": the failure to investigate the latter would constitute a 4th Amendment violation); Sevigny v. Dicksey, 846 F.2d 953, 957 (4th Cir. 1988) (holding that while a jury cannot hold an arresting officer accountable for facts not available to him at the time, "it must charge him with possession of all the information reasonably discoverable by an officer acting reasonably under the

circumstances.”). The weakness of Spiller’s evidence for probable cause is compounded by Walker’s sworn affidavits that at the time of arrest, Spiller physically abused him, directed racial epithets toward him, and told him that if he did not confess to certain crimes, Spiller would use Walker to “clean up his books.” Determining whether Walker was an inmate at SCI-Greensburg on a certain date would have required only a telephone call or computer check. The issue of Spiller’s failure to investigate may be raised at trial.

V. State Law Tort Claims

Finally, at summary judgment I dismissed Walker’s state law tort claims against the defendants pursuant to Pennsylvania’s Political Subdivisions Tort Claims Act, 42 Pa. Cons. Stat. Ann. §8541, 8542 (1982). This Act provides general immunity to public employees from tort liability, but excludes from immunity public employees for “damages on account of injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury, and that such act constituted a crime, actual fraud, actual malice or willful misconduct. . .” 42 Pa. Cons. Stat. Ann. §8550. Plaintiff Walker has alleged malicious, willful and racist conduct by Detective Spiller (Amended Complaint, ¶¶ 13-15, 22; Exh. 7, Walker Decl.). It is possible that Walker may be able to prove his allegations of

malicious and willful misconduct at trial; therefore, I vacate my grant of summary judgment as to plaintiff’s state law claims against defendant Spiller.

VI. ORDER

AND NOW, this _____ day of June 1998, **IT IS ORDERED** that:

(1) the Plaintiff's Motion for Reconsideration (Docket ## 39,40,60) is **GRANTED** as to defendant Spiller and **DENIED** as to defendant City of Philadelphia;

(2) my Summary Judgment Order (Docket # 37) dated September 3, 1996 is **VACATED** as to defendant Spiller;

(3) Defendants' Motion for Summary Judgment (Docket #20) is **DENIED** as to defendant Spiller;

(4) the parties have until **July 10, 1998** to complete Discovery; and

(5) any additional motions, including a second motion for summary judgment, must be filed on or before **July 31, 1998.**

_____

Anita B. Brody, J.

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